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Race for Perfection: Children's Rights and Enhancement Drugs

Therese Powers

RACE FOR PERFECTION: CHILDREN'S RIGHTS AND ENHANCEMENT DRUGS

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I. INTRODUCTION

Today's society places a strong emphasis on perfection. Everyone strives to be the best, and often we want to become the best in the quickest way possible. Parents are no different in demanding the best from and for their children. Every parent is happy with a healthy child, but at the same time every parent wants his or her child to be as successful as possible. This success may come in the form of academic, athletic, or cosmetic excellence. Parents, however, often find themselves too caught up in this race for perfection and the children are left behind. Who represents the child's rights when a parent becomes too attached to the situation to recognize any problem?

Often, we find ourselves looking for the short cut to a solution. For example, a child may have behavioral problems and may not be performing well in school. Rather than take the time to address the problem, Ritalin may be given to the child so that he or she will just "sit still" and the stigma that the child is

a "problem" will be removed. Also, a boy may be perfectly healthy, but may simply be excessively short. Rather than encourage the boy's self-esteem and accept him for who he is, Human Growth Hormone may be given to the boy to "enhance" his height.

This Note will address the question of what are a child's rights when the child's views differ from his or her parents regarding the child's use or refusal of enhancement drugs such as Ritalin and Human Growth Hormone. This Note will begin with a description of Ritalin and Human Growth Hormone along with the uses and abuses of each drug. It will then discuss the evolution of children's rights dealing with situations such as civil commitment, abortion, and medical treatment over religious objection. Furthermore, it will draw comparisons from the case law in these situations to a child's right to refuse or have access to enhancement drugs. Finally, this Note will discuss the possibility of creating a statutory right to provide children with procedural due process rights with regard to enhancement medication.

This statutory right will give children greater access to courts and, as a result, will enhance their ability to protect their personal autonomy. This Note proposes an administrative hearing be held to determine what is truly in the best interest of the child when conflicts of interest arise. The difficulties of such a hearing will also be addressed. An administrative hearing will be difficult to implement because of the obvious obstacles: (1) intrusion on parental rights and family autonomy; (2) expenses involved in administrative hearings; and (3) the procedural difficulties associated with conducting such a hearing.

II. OVERVIEW OF RITALIN AND HUMAN GROWTH HORMONE

A. Ritalin

Estimates show that between four and ten percent of all school age children currently suffer from Attention Deficit-Hyperactivity Disorder (ADHD).[1] Children with ADHD may exhibit symptoms such as inattention, distractibility, and impulsiveness, usually associated with excessive motor activity, or hyperactivity.[2] The children who suffer from this disorder quickly frustrate teachers in the classroom because they are unable to conform to the classroom environment and thus, are often labeled as "learning disabled."[3] As a result of the teacher's frustration with this behavior, school administrators and parents react by demanding special education services or medical treatment.

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[1]James C. O'Leary, *An Analysis of the Legal Issues Surrounding the Forced Use of Ritalin: Protecting a Child's Legal Right to "Just Say No"*, 27 NEW ENG. L. REV. 1173 (1993). The terms ADD and ADHD are often used interchangeably. For purposes of this Note, the term ADHD will be used to refer to both ADD and ADHD.

[2]Victor W. Henderson, *Stimulant Drug Treatment of the Attention Deficit Disorder*, 65 S. CAL. L. REV. 397 (1991).

[3]O'Leary, *supra* note 1, at 1173.

The symptoms of ADHD are difficult to detect and the standards related to ADHD are considered by many to be too vague.[4] Often it is difficult to determine whether a child truly suffers from ADHD or whether teachers and parents are instead dealing with an undisciplined, difficult child.[5] Guidelines have been established for each of the three major symptoms to aid in the diagnosis of ADHD.[6] These typical characteristics are variable symptoms which may not be visible to a clinician and therefore must be observed by teachers and parents.[7]

A child's "hyperactivity can be distinguished from ordinary over-activity in that hyperactivity tends to be haphazard, poorly organized, and not goal directed. . . ."[8] The overall social atmosphere in which the child lives is also important in determining the degree of a child's hyperactivity. It may become impossible to differentiate ADHD from symptoms of a child's social environment when a child is subjected to inadequate, disorganized, or chaotic environments.[9] Symptoms appearing to resemble ADHD may be fostered by abusive home environments.[10] Conversely, home environments which are supportive may minimize symptoms of ADHD.[11]

The characteristics of ADHD have broad social and medical implications. A child's learning difficulties and a child's ultimate self-esteem both play a large

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[4]Anastasia Toufexis, *Worries About Overactive Kids; Are Too Many Youngsters Being Misdiagnosed and Medicated?*, TIME, Jan. 16, 1989, at 65. James Cavanaugh, a National Institute of Health Behavioral Scientist, claims that "hyperactivity is in the eyes of the beholder." Diagnosis is difficult because there is no laboratory test. The diagnosis is done simply through observation. Researchers believe ADD results from underactive brain function. However, no tests have been developed (i.e. blood test, brain scan). *Id.*

[5]Phillip Elmer-Dewitt, *Why Junior Won't Sit Still: Researchers Link Hyperactivity to an Abnormality in the Brain*, TIME, Nov. 26, 1990, at 59.

[6]Richard Welke, *Litigation Involving Ritalin and the Hyperactive Child*, 1990 DET. C.L. REV. 125, 134-35 (1990). A child should demonstrate at least three of the typical symptoms for inattention: (1) fails to complete projects he or she starts; (2) often does not appear to listen; (3) becomes easily distracted; (4) has difficulty concentrating on school work; and (5) has difficulty sticking to play activity. A child should demonstrate at least three of the following characteristics for impulsivity: (1) acts before thinking; (2) shifts repeatedly from one activity to another; (3) has difficulty in organizing work; (4) needs extensive supervision; and (5) frequently talks out in class. A child should demonstrate at least two of the following characteristics for hyperactivity: (1) runs around or climbs excessively; (2) has difficulty remaining still or fidgets; (3) moves repeatedly during sleep; and (4) is always moving. *Id.*

[7]*Id.* at 134. If there is a conflict between what parents observe, and what teachers observe, greater deference will be given to the observations of the teacher because teachers have a greater familiarity with age-appropriate norms.

[8]*Id.* at 137.

[9]*Id.; see also* Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment*, 50 WASH. & LEE L. REV. 695, 700 (1993).

[10]Henderson, *supra* note 2, at 402.

[11]*Id.*

role when the child enters the adult world. A child's ultimate self-esteem will be based on characteristics and personal feelings such as vulnerability, inability, and inadequacy.[12] Likewise, a young adult's self-esteem will suffer if she finds herself easily confused, unable to become organized, or incapable of completing tasks.[13]

The symptoms and characteristics of ADHD are often associated with, and eventually lead to, other problems and disorders. A child's impulsiveness and distractibility may interfere with academic performance. ADHD is often present with other developmental disorders, including language disorders such as dyslexia, as well as more pervasive language disabilities.[14] In addition, learning disabilities are a characteristic frequently linked to juvenile delinquency.[15]

The overall relationship of how ADHD affects a child's adult existence depends in large part on what actions are taken at the early stages of the child's education.[16] The therapy chosen to treat the symptoms of ADHD, whether counseling or drug therapy, will play a large role in the remainder of the child's life.

One of the most prominent, effective methods of treating a hyperactive child is stimulant drug therapy.[17] Stimulant drug treatment is preferred because it is inexpensive and produces almost immediate results.[18] Methylphenadine hydrochloride, better known as Ritalin, is the most widely prescribed stimulant drug for treating hyperactivity.[19] Ritalin, combined with counseling and special education can be an effective treatment for truly hyperactive children.[20]

Insomnia and nervousness are the most common side effects of Ritalin.[21] In addition, many children suffer from loss of appetite, abdominal pain, weight loss, and dermatological disturbances during periods of prolonged therapy.[22] More severe side effects such as allergic reactions, extensive bruising, and abnormally low red and white blood cell counts may also result from the use of Ritalin.[23] Ritalin has also been characterized as having the "potential for

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[12] Welke, *supra* note 6, at 140.

[13] *Id.*

[14] Henderson, *supra* note 2, at 404.

[15] Welke, *supra* note 6, at 141.

[16] *Id.* at 142.

[17] O'Leary, *supra* note 1, at 1174.

[18] *Id.*

[19] *Id.* at 1175.

[20] Elmer-Dewitt, *supra* note 5, at 59.

[21] Welke, *supra* note 6, at 147; *see also* Elmer-Dewitt, *supra* note 5, at 59.

[22] Welke, *supra* note 6, at 147.

[23] Rick Ansorge, *Too High on Ritalin? More Than a Million Kids Are Taking the Stimulant for Hyperactivity, but Critics Say Many Don't Need It*, TACOMA NEWS TRIBUNE, Jan. 15, 1997,

serious psychological dependence."[24] Most minor side effects usually disappear as the child becomes tolerant of the drug. The long term side effects of stimulant drugs on a growing child's brain are still not completely known.[25]

B. Human Growth Hormone

In 1985, the FDA approved the marketing of Synthetic Human Growth Hormone (HGH) for children with growth hormone deficiency.[26] Since its approval, the drug has become the forty-third largest selling pharmaceutical in the United States.[27] Human Growth Hormone can help increase the height of children who suffer growth retardation because of such disorders as growth hormone deficiency, chronic renal failure, and Turner's Syndrome.[28]

Despite its FDA approval for growth-deficient children, HGH is increasingly being used for children for whom it was never intended.[29] Recent medical studies have indicated that HGH may cosmetically enhance short, but otherwise healthy children.[30] Approximately 7,000 children in the United States suffer from classic human growth deficiency; however, HGH is now being used by approximately 20,000 -25,000 children.[31]

A study conducted by Dr. Raymond Hintz, a pediatric endocrinologist from Stanford University, announced that treatment of extremely short children with HGH "yielded average heights two to three inches taller than heights predicted at the beginning of the study".[32] Overall, however, the study cautioned that while HGH may add a couple of inches to a healthy child, scientists are not able to predict which children will benefit from treatment.[33]

The side effects, if any, of HGH will not be known for a number of years. Some commentators have compared HGH and anabolic steroids and have raised the possibility that HGH may be addictive because the desire to take the

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at FM1.

[24] *Id.* Dr. James Long described Ritalin in this manner in "The Essential Guide to Prescription Drugs." While there are some concerns surrounding the possibility of drug addiction, it does have less potential for addiction than cocaine because it is metabolized more slowly in the body. *Id.*

[25] O'Leary, *supra* note 1, at 1175.

[26] Curtis A. Kin, *Coming Soon to the "Genetic Supermarket" near You*, 48 STAN. L. REV. 1573 (1996).

[27] *Id.*

[28] *Id.* at 1574.

[29] Rick Weiss, *Are Short Kids Sick? Doctors and Drug Makers May Be Overpromoting a Profitable Hormone that Makes Children Taller*, WASH. POST, Mar. 15, 1994, at Z10.

[30] Kin, *supra* note 26, at 1574.

[31] Weiss, *supra* note 29; Kin, *supra* note 26, at 1583.

[32] *Id.* at 1587.

[33] *Id.*

medication is driven by the same social motivation as steroid users.[34] In addition, there may be emotional and psychological problems associated with a child's use of HGH. There may be situations in which a child may actually want HGH because the child feels psychologically handicapped by his or her short stature.[35] The attention needed to administer the drug up to three times a week may, in itself, be a psychological burden.[36] In addition, children, as well as parents, may be disappointed if they have unrealistic expectations or there is no response to treatment.[37] A short, otherwise normal and healthy child, who receives constant injections to promote growth may be stigmatized by the implication that his or her body is unacceptable in the eyes of his or her parents.[38] The use of HGH on healthy children sends the message that being short is a problem and that the child is not good enough by his or her parents standards.

C. Competing Interests in Administering Ritalin & HGH

While there are many children who need and rely on Ritalin and HGH, there are also many children who are currently taking these medications for the wrong reasons. There are many children who really do have a difficult time with school as well as many children who suffer from severe growth deficiency. There are, however, children who become left behind in the race for perfection. Some parents may panic if their child is not the perfect student, the best athlete, or the most attractive child. Parents always want their children to do as well as possible and often will purchase whatever "enhancement" they can afford.[39] Parents may have limits as to how far they are willing to go to achieve this perfect life for their child. In a distorted effort to create the perfect child, however, many parents may encourage their healthy child to take "enhancement drugs" such as Ritalin or HGH.

Parents may be tempted to administer HGH to their perfectly healthy child if he or she is merely predicted to be below average height. Social scientists have referred to this height bias in our society as "heightism."[40] Heightism is the idea that height is prized in our society, not only in the sports and entertainment worlds, but is also important in influencing decisions pertaining to offers of employment, salaries, advancement in various occupations, choice

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[34] George Fan, *Anabolic Steroid and Human Growth Hormone Abuse: Creating an Effective and Equitable Ergogenic Drug Policy*, 1994 U. CHI. LEGAL F. 439, 464-65 (1994).

[35] Melvin Grumbach, *Growth Hormone Therapy and the Short End of the Stick*, 319 NEW ENG. J. MED. 238, 240 (1988).

[36] *Id.* at 240.

[37] *Id.*

[38] Kin, *supra* note 26, at 1598.

[39] Dorothy Wertz, *Society and the Not-So-New Genetics: What Are We Afraid Of? Some Future Predictions from a Social Scientist*, 13 J. CONTEMP. HEALTH L. & POL'Y 299, 331 (1997).

[40] Grumbach, *supra* note 35, at 238.

of a marital partner, and politics.[41] Parents want to prevent their child from being subjected to this stigma that some attach to being short.

A child who does not suffer from growth deficiency may get the idea that he or she is inadequate if given HGH.[42] In addition, while the true side effects of HGH will not be known for years, doctors caution users of possible side effects including overgrowth in breast tissue, specifically in males, carpal tunnel syndrome, diabetes-like symptoms, and possibly even leukemia.[43]

Parents arguably have the support of the medical community in encouraging the use of HGH. A 1996 survey of United States pediatric endocrinologists found that eighty percent prescribed growth hormones to children who were shorter than average, but who did not suffer from true growth deficiency.[44] Another study conducted by the Lawson Wilkins Pediatric Endocrine Society indicated that doctors prescribe growth hormone therapy to short stature children who have conditions outside the prevailing FDA guidelines.[45] These doctors indicated that they were driven by factors such as family preferences, cost, and physician perception of the value of height and growth hormone treatment.[46] In addition, guidelines released in early 1997 by the American Academy of Pediatrics support giving growth hormone therapy to children who are so short that they will not function as well as other children even if they are not hormone-deficient.[47] Some commentators argue that children who are extremely short should be given the opportunity to receive HGH treatment; yet, drawing that line would be arbitrary because at any height a person is potentially handicapped in relation to those who are taller.[48]

Parents may demand Ritalin for their child to avoid the stigmatization of having their child in remedial classes. Parents expect their children to achieve excellence in all aspects of life, school being no exception. Statistically, ADHD

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[41] *Id.* Research conducted regarding the relevance of height and success in presidential elections revealed that in twenty-one elections from 1904 to 1984, the taller candidate won eighty percent of the time. In addition, from 1789 to 1988, only two presidents have been shorter than the nation's average height at the time of their presidencies. *Id.*

[42] Weiss, *supra* note 29, at Z10. Doctors argue that "teachers and parents should be helping kids to accept themselves as they are, rather than giving them drugs to make them 'better'." Overprescribing HGH affects ideas about what people want from their children.

[43] Rick Weiss, *Probable Benefits- and Possible Risks*, WASH. POST, Mar. 15, 1994, at Z13.

[44] Leader Publications, New York Law Publishing Company, 14 NO. 12 MED. MALPRACTICE L. & STRATEGY 7 (1997).

[45] Barry B. Bercu, *The Growing Conundrum; Growth Hormone Treatment of the Non-Growth Deficient Child*, 276 JAMA 567 (1996).

[46] *Id.*

[47] Leader Publications, *supra* note 44, at 7.

[48] Norman Fost, *A Commentary on Shapiro's Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 115, 119 (1991).

is most commonly diagnosed in prosperous suburbs, where the pressures to achieve are frequently greatest.[49] Schools may encourage the prescription of Ritalin to create an easier environment for teachers who do not want to take the extra time to address the borderline children who need extra help. In addition, schools want to be as advanced as possible and therefore may rely on the federal funds which are provided for the diagnosis of children who need special education programs.[50]

Within the medical field and among parents, concern is growing that too many children are being incorrectly labeled with ADHD and, as a result are improperly medicated.[51] Hyperactivity has become a convenient "wastebasket diagnosis" into which doctors and impatient parents, teachers, and school administrators toss too many hard to handle children.[52] Children may have a language or learning disability or may simply be rambunctious and rather than addressing the problem, the child is diagnosed as hyperactive and Ritalin is administered.[53] However, in defense of Ritalin, many physicians cite studies which indicate that Ritalin is generally safe and effective in eighty percent of cases of hyperactive children.[54]

The ultimate pressure for the use of Ritalin comes from school administrators. Some argue that school administrators have come to regard Ritalin as essential to the education of hyperactive children without giving much weight to the importance of other, equally valid, forms of therapy.[55] As a result, parents feel pressured from the schools' threats that if they do not allow their child to take Ritalin, their child will be placed in an isolated environment or may possibly face expulsion.[56] Schools argue that they are concerned that other childrens' educations will be compromised unless certain children receive the drug.[57]

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[49] Toufexis, *supra* note 4, at 65.

[50] *See infra* notes 58-61 and accompanying text.

[51] Sandra G. Boodman, *Attention Deficit Disorder; Do Millions of Americans Really Have It?*, WASH. POST, Mar. 5, 1996, at Z14. ADD has become the latest fad disorder for frustrated parents and overburdened public school administrators who rely on Ritalin for its immediate results. *Id.*

[52] *Id.* A study conducted at the University of Chicago revealed that of 200 children brought to the University's ADHD Clinic, forty percent did not suffer from hyperactivity. Toufexis, *supra* note 4, at 65.

[53] *Id.*

[54] *Id.*

[55] O'Leary, *supra* note 1, at 1180.

[56] *Id.*; Valerie J. v. Derry Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991). Court held a child's education cannot be conditioned on parents consent to administer Ritalin.

[57] O'Leary, *supra* note 1, at 1180. Education of the remainder of the class becomes difficult because one hyperactive child may distract other children. In addition, teachers

Money plays a role in this race for perfection. Schools are increasingly faced with shrinking budgets and program downsizing, and are consequently overusing Ritalin in an effort to comply with the demands of federal special education legislation.[58] The Education of the Handicapped Act provides federal money to assist state and local agencies in educating children and conditions such funding upon a state's compliance with extensive goals and procedures.[59] "The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.'"[60] Schools depend on the federal money provided for compliance with programs that address special education legislation and, therefore, may give borderline children Ritalin when in fact the child has problems which would be more effectively addressed through other means.[61]

Money also plays a role in administering HGH to children. The makers of the drug have been under fire for financial contributions made to two non-profit foundations which are being used by the companies as tools to expand the growth hormone market.[62] The foundations have organized screening programs in schools to identify short children and to notify their parents of the need to see a doctor.[63] Foundation officials claim in their defense that they are merely trying to identify children who might not otherwise receive the support and the treatment that they need.[64] It is difficult, however, to overlook who supplies money to these non-profit foundations. These foundations survive on the money from the drug-maker and therefore may have an incentive to encourage the use of the drug. Border-line children may be labeled short and their parents will be introduced to HGH through these foundations.

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may have to spend too much time with the child with behavioral problems and, as a result, may neglect the rest of the class.

[58] *Id.*

[59] 20 U.S.C. § 1401 (1990).

[60] *Derry*, 771 F. Supp. at 488.

[61] O'Leary, *supra* note 1, at 1180.

[62] Weiss, *supra* note 29, at Z10. Human Growth Foundation in Falls Church, Virginia, and MAGIC Foundation in Oak Park, Illinois. According to their brochures, their goals are to provide education and support for parents of short children.

[63] *Id.*

[64] *Id.*

III. CHILDREN'S RIGHTS

A. Generally

Emphasis on advancing children's legal rights was a popular topic of several major United States Supreme Court cases from the mid-1960's to the early 1980's.[65] However, while children's rights continue to be a focus, there have been many more restrictions placed on children's rights in the past decade.[66] Recognizing the rights of children today is very important as traditional family and social models are frequently changing.

Defining children's rights and how those rights can best be effectuated without damaging family relationships is important to child development.[67] By the end of the 1960's the Warren Court had established that children have the right to equal protection under the law.[68] In *In re Gault*, the Court laid the basic foundation for state adjudication of delinquency and recognized that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[69] The Court held that due process requires that a minor be given adequate written notice of the issues, the right to be represented by counsel, the right to confront his or her accusers, and the right to cross-examine witnesses.[70]

Courts have not been uniform in dealing with children. The Court has acknowledged children's fundamental rights, while at the same time adhering to the principle that the state has somewhat broader authority to regulate the activity of a child than the conduct of a similarly situated adult.[71] Children's immature, undeveloped ability to reason in an adult-like manner is what separates children from adults for most purposes of the law.[72] Thus, the Court has afforded children fewer rights than adults based upon a competency distinction: children are less competent psychologically than adults.[73]

Courts have addressed childrens' rights and access to educational opportunities. The United States Supreme Court defined free, appropriate,

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[65]Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L.J. 321, 336 (1996).

[66]*Id.*; *See also* Veronia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (holding that a public school district policy mandating random drug testing for interscholastic athletes did not violate students rights to be free from unreasonable searches); New Jersey v. T.L.O., 469 U.S. 325 (1985) (waiving warrant and probable cause requirement for school searches where children are involved).

[67]Wardle, *supra* note 65, at 339.

[68]*In re Gault*, 387 U.S. 1 (1967).

[69]*Id.* at 13.

[70]*Id.* at 29-31.

[71]John Goetz, *Children's Rights Under the Burger Court: Concern for the Child but Deference to Authority*, 60 NOTRE DAME L. REV. 1214, 1219 (1985).

[72]Redding, *supra* note 9, at 706.

[73]*Id.*

public education in *Board of Education of Hendrick Hudson Central School District of Westchester v. Rowley*.[74] In *Rowley*, the Court held that a "'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction".[75] *Valerie J. v. Derry Cooperative School District* addressed the issue of a school's demand for a child to take Ritalin and a child's entitlement to a free, appropriate, public education.[76] In *Derry*, the school presented the parents of a twelve-year-old educationally handicapped child with the difficult choice of either placing their child on Ritalin or the child would be suspended from the school indefinitely.[77] The school threatened suspension because the boy continually gazed out the window and disrupted the class.[78] The *Derry* court recognized that the boy was educationally handicapped during this period and that he was denied procedural protections of the Individuals With Disabilities Act.[79] The court held the young boy had a right to a free, appropriate, public education and that his right to an education could not be based on the condition that he receive medication without the express consent of his parents.[80]

In a more recent decision, there was a role reversal in the conflict to administer Ritalin to a child.[81] In *Davis v. Francis Howell School District*, the court denied injunctive relief to parents who wanted their child's school to administer twice the normal dose of Ritalin to their child.[82] The child's parents based their argument on the Americans with Disabilities Act and the Rehabilitation Act.[83] The parents argued that under these Acts, the school must accommodate their child's disability and its refusal to comply interfered with their right as parents to determine the care of their child.[84] However, the court

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[74] 458 U.S. 176 (1982).

[75] *Id.* at 188-89.

[76] *Derry*, 771 F. Supp. at 483.

[77] *Id.*

[78] *Id.* at 486.

[79] *Id.* at 490. The Education of the Handicapped Act, 20 U.S.C. § 1400 et seq., was created to meet the educational needs of handicapped children by providing a free, appropriate education. The act was amended in 1990 and it is now known as the Individuals With Disabilities Act. *Id.* at 487.

[80] *Id.* at 490.

[81] Davis v. Francis Howell Sch. Dist., 104 F.3d 204 (1997).

[82] *Id.*

[83] *Id.* at 206.

[84] *Id.*

disagreed and decided that the parents failed to demonstrate the school's refusal to administer the Ritalin would cause irreparable harm to their child.[85]

B. Children's Rights vs. Parental Rights

The Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment grants parents a fundamental right to oversee the health and welfare of their child.[86] As a result, there has been a deference to the liberty rights of parents in the supervision of their minor child's health care.[87]

The Supreme Court first recognized a right of parental autonomy over the family in *Meyer v. Nebraska*.[88] In *Meyer*, the Supreme Court of Nebraska convicted a teacher who taught German to a ten-year-old child in violation of a state statute forbidding the instruction of modern languages to children below the eighth grade.[89] The United States Supreme Court found the statute violated the guarantee of liberty provided in the Fourteenth Amendment Due Process Clause.[90] The Court held that the term "liberty" in the Fourteenth Amendment embraces the right of parents to "establish a home and bring up children. . . ."[91]

There is a general presumption that parents are free to determine what is "best" for their children depending on their own beliefs, preferences, and lifestyles. Parental rights constitute the greatest legal obstacle to government intervention to protect children from harmful parenting practices. The usual justifications for parental rights fall under three categories: (1) children's interests in intimate relationships and in receiving care from those who know them best and care most about them; (2) parents' interests in intimate relationships and in molding a life in accordance with their ideals; and (3) society's interest in pluralism and in the family as an essential building block of democratic culture.[92] There should, however, be a limitation on legal rights because no individual is entitled to completely control the life of another person free from outside interference.[93]

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[85] *Davis*, 104 F.3d at 207.

[86] Janine P. Felsman, *Eliminating Parental Consent and Notification for Adolescent HIV Testing: A Legitimate Statutory Response to the AIDS Epidemic*, 5 J.L. & POL'Y 339, 359 (1996).

[87] *Id.*

[88] 262 U.S. 390 (1923).

[89] *Id.* at 397.

[90] *Id.* at 399-403.

[91] *Id.* at 399.

[92] James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents Rights*, 82 CAL. L. REV. 1371, 1373 (1994).

[93] *Id.*

Children do require some governance and discipline for healthy development, but should not be stripped of personal autonomy. Currently, courts analyze conflicts between parents' rights and children's rights by looking at the overall community of child-rearing and the rights associated with that responsibility.[94] A different, perhaps better, approach would be to make these decisions based on the child's welfare.[95] Giving parents broad discretion in determining children's rights supports the idea that one person may be entitled to control or direct the life course of another.[96]

Many in the legal community have criticized the traditional role of parents as health care managers of their children.[97] Critics of parents' complete control of health care decisions argue children will be given a greater level of protection if parents are required to make decisions in accordance with children's rights rather than the parents own ideals.[98]

The main rationale offered by courts to protect parental control is simply that parents have traditionally held such rights.[99] The problem with this rationale is that simply because something is a long-standing tradition or practice does not automatically render the practice just.

The Supreme Court has addressed the clashing interests between children and their parents, and the prominent theme which has emerged is inconsistency. In 1979, in *Parham v. J.R.*, the Court warned that if parents fail to give their children the necessary care, support, and attention, the state may exercise its *parens patriae* power to intervene and deprive the parents of all further authority over their children.[100] In contrast, the Court has taken a more hands-off approach to a parent's role when a minor seeks an abortion.[101] The Court has established a shared parent-state position with regard to abortion and has deferred to the traditional authority of parents regarding voluntary decisions as well as mental health treatment.[102]

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[94] *Id.* at 1376.

[95] *Id.*

[96] *Id.*

[97] Felsman, *supra* note 86, at 361.

[98] *Id.* at 361-62.

[99] Dwyer, *supra* note 92, at 1424.

[100] Parham v. J.R., 442 U.S. 584, 603 (1979).

[101] *See infra* notes 116-17.

[102] *See infra* notes 103-11,116-17.

C. Civil Commitment

In *Parham v. J.R.*, the Court defined what due process a child is entitled to when his parents want to institutionalize him for mental care.[103] The Court considered whether due process requires a pre-confinement hearing when parents voluntarily seek institutional mental health care for their children.[104] The child's desire to be free from institutional commitment and the parents' interest in seeking help and guidance for their child creates a strong clash. To resolve this conflict, the Court held that parents should retain a dominant role in the commitment decision absent a finding of abuse or neglect.[105] Further, the Court held that most children, even in adolescence, are not capable of making sound judgments concerning many decisions, including their need for medical care or treatment.[106] The Court recognized that parents generally act in the best interests of the child and upheld the traditional parenting role.[107] However, the Court required a neutral fact finder determine whether the minimum statutory requirements have been met, which gives the child adequate protection without imposing on traditional parental authority.[108] The Court concluded that due process is afforded to a child when an independent medical decision-maker decides whether the child stays in the hospital.[109] Those in favor of the Court's decision in *Parham* believe that parents alone should decide treatment for their children.[110] The Court afforded minimal due process because of the belief that parents will do what is best for their children.[111] However, to defend the child's rights more consideration should be given to the idea that the child, not the adult, is faced with a possible deprivation of liberty in cases of civil commitment.

If adults are capable of refusing psychotropic drugs, what is the basis for denying children this right?[112] While Ritalin and HGH are not considered to be psychotropic drugs, they are drugs which significantly impact a child's life

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[103] Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y 199, 216 (1992); *See Parham*, 442 U.S. at 606-08.

[104] *Parham*, 442 U.S. at 587.

[105] *Id.* at 604.

[106] *Id.* at 603.

[107] *Id.* at 602.

[108] *Id.* at 606-07.

[109] *Parham*, 442 U.S. at 618.

[110] Redding, *supra* note 9, at 714.

[111] *Parham*, 442 U.S. at 602.

[112] *See infra* notes 209. Arguably, children do not have the same capacity to consent as an adult; however, there are guidelines to help determine if a child is competent on an individual basis.

and have many possible side effects.[113] Comparing the administering of enhancement drugs to civil commitment, a justification for denying children the right is that children are not capable of making sound judgments regarding important decisions, including medical care.[114] However, perhaps a better solution, drawing from *Parham*, would be to involve a neutral fact finder with no connection to the school, the drug companies, or the parents. A disinterested party may be the solution to determining what the proper treatment should be. *Parham* suggests that parents should maintain a dominant role in making decisions regarding civil commitment of their children.[115] Parents should also maintain an important role in administering enhancement drugs. However, the parents' role should not be one of dominance and should be viewed more subjectively by the courts and the legislature. If a parent has improper motives and is not acting in the child's best interest, then a neutral party should step in to resolve the situation to ensure that the child is not being improperly medicated.

D. Abortion

The Supreme Court has not upheld the traditional rights of parents when minor's seek access to abortions.[116] The Court has given the child a significant right against her parents: the right to go to the state for permission to seek counseling and assistance to obtain an abortion without parental approval. The Court has vested a "right of choice" in a child by allowing a child to decide to whom she will turn to for advice, the parent or the state.[117]

The Court addressed this "right of choice" for children in *Planned Parenthood v. Danforth* when it struck down a Missouri abortion statute as unconstitutional based on its parental consent provision.[118] The applicable portion of the statute required a minor woman to receive the written consent of a parent before obtaining an abortion unless a physician certified that the abortion was necessary to preserve the life of the mother.[119] The Court held that minors can by-pass parental consent to obtain an abortion if a court decides it is in the best interest of the minor or that the minor is capable of mature decision-making.[120] The Court reasoned that the state had no significant interest in conditioning an abortion on the consent of parent.[121]

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113 *See supra* notes 12-25 and 34-38 and accompanying text.

114 *See supra* notes 103-111 and accompanying text.

115 *Parham*, 442 U.S. at 604.

116 *See infra* notes 118-133 and accompanying text.

117 Goetz, *supra* note 71, at 1228.

118 428 U.S. 52, 73 (1976).

119 *Id.* at 72.

120 *Id.* at 74.

121 *Id.* at 75.

Three years later in *Belotti v. Baird* the Court struck down a similar statute in Massachusetts which required parental consent before a minor could obtain an abortion.[122] In *Belotti,* the Court considered three factors to distinguish between constitutional rights of children and adults: (1) the vulnerability of minors; (2) the decision making capabilities of minors; and (3) the importance of parental involvement in child rearing.[123] The Court concluded that during childhood "minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[124] *Belotti* gave a minor the right to go directly through the courts without consulting or even notifying her parents.[125] Furthermore, a state must provide an alternative for obtaining judicial authorization if it imposes a parental consent requirement as a condition to an unwed minor's abortion.[126] The Court held that the minor is permitted to show the court either that she is sufficiently mature and well informed to make her abortion decision in consultation with her physician independent of her parents' interests, or that the desired abortion would be in her best interests.[127] *Belotti's* rationale influenced future parental involvement statutes.[128]

In 1981, the Court confronted a Utah parental notification statute in *H.L. v. Matheson.*[129] In *Matheson,* a fifteen-year-old girl who lived with her parents and made no claim to be emancipated sought to terminate her pregnancy without parental involvement.[130] The young girl was unsuccessful in her attempt to challenge the parental notification statute because the Court found that she did not show sufficient maturity to make such an important decision.[131] The *Matheson* Court held that parental notification was "reasonably calculated" to serve state interests by: (1) promoting family integrity; (2) encouraging parental consultation; and (3) allowing parents to supply medical information.[132] In addition, the Court refused to grant a minor maturity status simply because she was pregnant.[133]

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[122] *See Belotti,* 443 U.S. 622, 647 (1979).

[123] *Belotti,* 443 U.S. at 633-40.

[124] *Id.* at 635.

[125] *Id.* at 647.

[126] *Id.* at 651-52.

[127] *Id.* at 643-44.

[128] Maggie O'Shaughnessy, *The Worst of Both Worlds? Parental Involvement Requirements and the Privacy Rights of Mature Minors,* 57 OHIO ST. L.J. 1731 (1996).

[129] 450 U.S. 398 (1981).

[130] *Id.* at 400-01.

[131] *Id.* at 405-06.

[132] *Id.* at 412.

[133] *Id.* at 408.

Recent cases addressing parental authority and a minor's right to obtain an abortion rely on the same arguments developed by the Court over the past three decades.[134] In *Planned Parenthood v. Casey*, the Supreme Court upheld a one-parent consent statute with a judicial bypass provision.[135] The Court distinguished the parental consent requirement from a spousal notification requirement based on the belief that "children will often not realize that their parents have their best interests at heart."[136]

Planned Parenthood v. Miller addressed the decision-making capabilities of minors.[137] The *Miller* Court reviewed a South Dakota statute which required a physician to notify a parent of a minor's decision to abort at least forty-eight hours before the procedure is to take place.[138] The *Miller* Court held that minors are not capable of making informed, independent decisions about abortions and that this choice must be regulated by the state.[139] Despite the lack of decision-making ability by minors, the *Miller* Court held that the state must provide a procedure to regulate a minor's choice to terminate a pregnancy.[140] However, the state must provide a by-pass procedure in their regulation in order to pass a constitutionality test.[141]

These decisions indicate the Court's shift from the traditional view that decisions regarding abortions for minors are made strictly within the family context. The Court has moved toward a shared parent-state power in governing minors in this context to advance children's rights against their parents rights. However, these decisions should not be misinterpreted as giving children more rights in today's society. The Court had merely given its opinion regarding who is best suited to make proper decisions for minors.[142] In the abortion context, the child still can not act on her own; she can merely choose with whom she will talk to about her options.[143]

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[134] O'Shaugnessy, *supra* note 128, at 1748.

[135] 505 U.S. 833 (1992).

[136] *Id.* at 895.

[137] 63 F.3d 1452 (8th Cir. 1992), *cert. denied, sub nom.* Janklow v. Planned Parenthood, 517 U.S. 1174 (1996).

[138] *Id.* at 1454 (citing S.D. Codified Laws § 34-23A-7) (Michie 1998). Three exceptions to the notification requirements are: 1) a medical emergency, 2) a patient's report that a parent has been notified; and 3) a physicians report that the minor has stated she is an abused or neglected child. *See also*, O'Shaugnessy *supra* note 128, at 1748.

[139] *Miller*, 63 F.3d at 1459.

[140] *Id.* at 1459.

[141] *Id.* at 1460.

[142] Goetz, *supra* note 71, at 1231.

[143] *Id.* at 1230.

Children's personal autonomy is important and they should be given alternatives regarding decision-making and the use of enhancement drugs.[144] The principle of minor's rights should remain the same even if those seeking abortions are presumably older than those who would be given Ritalin and HGH. The Court has stressed the importance of a minor's personal autonomy and welfare in creating the shared parent-state decision making for a minor's rights to an abortion and has upheld all judicial bypass provisions in major abortion cases that have come before it.

This shared parent-state authority should also be utilized in decision-making for children in the use of enhancement drugs. It is difficult to justify intruding on parental authority and the autonomy of the family; however, it is important that a child's welfare be at the center of decision-making. In order to achieve this goal, regulations are needed to ensure that children are not being improperly medicated to conform to their parents' and society's standards.

E. Religion

In virtually all jurisdictions, statutes prohibit the medical treatment of minors without the consent of one of their parents, except under emergency circumstances.[145] Courts will, however, intervene when there is evidence to suggest that parents have failed to provide necessary medical treatment. Judges often defer to exclusive parental child-rearing authority when the parents are motivated by religious beliefs.[146] State legislatures condemn the practice of withholding medical care from children based on the state's asserted interest in protecting children.[147] Parents who decline medical treatment for their child for religious reasons may face civil and criminal penalties for their child's death despite their religious intent in withholding conventional care.[148]

The Supreme Court has not decided a case in which parents faced civil or criminal punishment for declining conventional life-saving treatment for their child based on religious grounds. The Court, however, in *Prince v. Massachusetts* held that the state's interest in protecting children in a non-medical context overrides parental religious freedom.[149] *Prince* involved a Jehovah's Witness

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[144] *See supra* notes 110-15 and accompanying text.

[145] Martha Swartz, *The Patient Who Refuses Medical Treatment: A Dilemma for Hospitals and Physicians*, 11 AM. J.L. & MED. 147, 183 (1985).

[146] Dwyer, *supra* note 92, at 1377.

[147] Anne D. Lederman, *Understanding Faith: When Religious Parents Decline Conventional Medical Treatment for Their Children*, 45 CASE W. RES. L. REV. 891, 893 (1995).

[148] *Id., See also* State v. McKann, 475 N.W.2d 63 (Minn. 1991)(charged Christian Science parents with second degree manslaughter for withholding medical treatment resulting in child's death); Commonwealth v. Twichell, 617 N.E.2d 609 (Mass. 1993). (Christian Science parents charged with involuntary manslaughter).

[149] Prince v. Massachusetts, 321 U.S. 158 (1944).

who allowed her daughter to sell reading materials in violation of child labor laws.[150] The *Prince* Court held that the "right to practice religion freely does not include liberty to expose . . . the child to . . . ill health or death."[151] Further, the Court stated, "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[152] The *Prince* Court treated the danger to the child's welfare as a public policy concern and a threat to the interest of society as a whole rather than a threat directly to the child.[153] *Prince* conveys the message that the Free Exercise Clause protects parents' efforts to indoctrinate their children and to include their children in various religious practices as long as the practices do not expose their children to grave danger.[154]

The Supreme Court first addressed parental denial of medical treatment based on religious beliefs when it affirmed, without an opinion, the district court decision in *Jehovah's Witnesses v. Kings County Hospital*.[155] The plaintiffs sought declaratory judgment and an order enjoining Washington physicians and hospitals from administering blood transfusions to Jehovah's Witnesses who objected to the treatment.[156] Specifically, the plaintiffs challenged as unconstitutional two Washington statutes which declared several of the plaintiffs' children to be wards of the court for the purpose of administering blood transfusions.[157] The district court upheld the statute based on the rationale of *Prince*, that "[t]he right to practice religion freely does not include liberty to expose . . . the child to ill health or death".[158]

Walker v. Superior Court,[159] also involved parental denial of medical treatment for religious reasons and addressed whether religious liberty guaranteed by the Free Exercise Clause exempted a parent from criminal culpability. The mother in *Walker* relied on spiritual treatment rather than conventional medical treatment to treat her daughter's meningitis.[160] The

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[150] *Id.* at 161-62.

[151] *Id.* at 166-67.

[152] *Id.* at 170.

[153] Dwyer, *supra* note 92, at 1382.

[154] *Id.*

[155] 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

[156] *Id.* at 491.

[157] *Id.*

[158] *Id.* at 504. Plaintiffs additionally claimed that the statutes infringed upon their First Amendment rights to free association and their Fifth Amendment right to due process guarantees of life and liberty.

[159] 763 P.2d 852 (Cal. 1988).

[160] *Id.* at 855.

Walker court stressed the importance of children in stating that "children are an interest of unparalleled significance; the protection of the very lives of California's children upon whose 'healthy, well-rounded growth . . . into full maturity as citizens our democratic society rests, for its continuance.'"[161]

Children were also the focus of *In re Willman*[162] which recognized that parents have rights to deny themselves whatever medical treatment they choose, but they are not free to impose that denial of treatment upon a child.[163] In *Willmann*, a hospital brought an action to have a minor child declared a dependent child and the hospital alleged the child's environment warranted the state to assume guardianship.[164] The state was compelled to intervene because the parents' refused to give doctors their permission to treat their son for an aggressive form of cancer due to their religious beliefs.[165] The doctors were convinced that the boy's only chance for survival depended on the removal of a tumor and possibly amputating his left arm.[166] The court held the state was permitted to intervene and declare the boy a dependent of the state.[167] Parental authority must yield to that of the state when the parents' religious beliefs will expose the child to ill health or death.[168]

States are permitted to take action over a parents' religious objections when the life of a child is considered at risk. As stated previously, parents may deny themselves access to medical care, but they are not permitted to make these same decisions when a child is involved.[169] Access to, or refusal of, Ritalin or Human Growth Hormone does not involve the potentially life threatening situations discussed in the above-mentioned cases dealing with emergency treatment. However, the same principles should be involved because the child's physical and emotional well-being is always important. A parent should not expose a child to ill health because of social pressures. Religious motivations are not given great protection when children are involved, and it is not likely that parents' personal motivations will be given great deference. The government has a strong interest in saving the life of a child. While there may be no imminent danger to a child, the potential side effects, and social and psychological implications from the use of Ritalin and Human Growth Hormone may cause serious problems, possibly jeopardizing a child's life.

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[161] *Id.* at 869, *citing* Prince v. Massachusetts, 321 U.S. 158 (1944).

[162] 493 N.E.2d 1380 (Ohio Ct. App. 1986).

[163] *Id.* at 1390.

[164] *Id.* at 1382.

[165] *Id.* at 1383.

[166] *Id.*

[167] Willman, 493 N.E.2d at 1390.

[168] *Id.* 1389.

[169] *Id.* at 1390.

F. Non-Religious Objections to Conventional Medical Treatment

Parents may also object to conventional medical treatment for non-religious reasons. The parent does not receive First Amendment protection in these situations, but the state must still balance the parental authority with what is in the best interest of the child.[170]

A New York court addressed this balance in *In re Hofbauer*, which involved a seven-year-old who suffered from Hodgkins Disease and the attending physician recommended radiation treatment and chemotherapy.[171] Subsequently, the boy's parents took him to Jamaica where he was treated with nutritional and metabolic therapy.[172] When the child returned to the United States a Social Services Commissioner filed a neglect petition against the parents for failing to follow the doctor's recommendations.[173] Social Services intitially removed the child from his parents custody, but later returned him under the condition that a licensed physician administer the metabolic treatment.[174] The New York Court of Appeals determined the child was not neglected and held that parents have a "fundamental right" to raise their child and the court should afford great deference to the parents' choice of medical treatment.[175] However, the court noted the choice should be measured against "an ordinarily prudent and loving parent, 'solicitous for the welfare of his child and anxious to promote (the child's) recovery'."[176]

A Massachusetts court confronted a similar scenario in *Custody of a Minor*, and held that metabolic therapy was not an acceptable alternative for treating a child's cancer.[177] In *Custody of a Minor*, a three-year-old underwent chemotherapy treatment for acute lymphocytic leukemia.[178] The leukemia went into remission and the child's parents discontinued the child's medication without informing the physician.[179] The court held the child was in need of care and protection, placed the child in the custody of the Department of Welfare, and ordered chemotherapy treatments for the child.[180] The court

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[170] Jennifer Trahan, *Constitutional Law: Parental Denial of a Child's Medical Treatment for Religious Reasons*, 1989 ANN. SURV. AM. L. 307, 325 (1990).

[171] 393 N.E.2d 1009 (N.Y. Ct. App. 1979).

[172] *Id.* at 1011.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 1013.

[176] *Hofbauer*, 393 N.E.2d at 1013.

[177] 393 N.E.2d 836 (Mass. 1979).

[178] *Id.* at 838.

[179] *Id.* at 838. When symptoms began to reappear, the parents began to treat the child with metabolic therapy. *Id.* at 840.

[180] *Id.* at 838.

based its decision on the idea that a parent's "first and paramount duty is to consult the welfare of the child."[181] The court recognized limitations to parental autonomy and concluded that "[t]his case well illustrates that parents do not and must not have absolute authority over the life and death of their children. Under our free and constitutional government, it is only under serious provocation that we permit interference by the State with parental rights."[182]

In addressing cases in which a parent has a non-religious objection to medical treatment, courts have focused on a number of factors: (1) the chances of successful treatment; (2) the expected duration, possible side effects; (3) alternatives to the treatment; and (4) the chance of death to a child.[183]

These factors potentially place limits on parental autonomy and can be used to determine whether administering Ritalin or HGH is appropriate. The chances of successful treatment will be difficult to determine because the long-term effects of HGH are not known and because the use of Ritalin often does not help the child as much as it helps the people around him. In addition, states may justify intrusion on parental autonomy because of the existence of alternative procedures. There may be no threat of death, but there may be serious harm to the child's welfare if a child improperly takes Ritalin and HGH. Overall, applying the above described factors weighs heavily in favor of state interference with forced administration of enhancement drugs. It will, however, be difficult to overcome the obstacle that there is no imminent danger or threat of death in giving a child enhancement drugs.

IV. CHILDREN'S COMPETENCE TO CONSENT

Common law views children as virtual property of their parents.[184] The primary justification for denying children the power to consent is that they may be harmed by the consequences of bad decision making.[185] The state has a duty as *parens patriae* to protect dependent persons from harm; the state must enhance children's welfare, or at the very least, minimize their harm.[186] However, the state remains reluctant to intrude into parental interests.

Traditionally, children are viewed as not being capable of making sound, informed, and mature judgments.[187] Reasons frequently cited for not extending to children a right to make important decisions include: a lack of life experience necessary for fully informed values and sound judgment, the child's

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[181] *Id.* at 843.

[182] *Custody*, 393 N.E.2d at 846.

[183] Trahan, *supra* note 170, at 331.

[184] GARY P. MELTON & GERALD P. KOOCHER, CHILDREN'S COMPETENCE TO CONSENT 21 (1983).

[185] *Id.*

[186] *Id.* at 22.

[187] Redding, *supra* note 9, at 704.

inability to manage adult responsibilities, reluctance to require a child to bear the consequences of adult decision making, the desire to avoid the family disruption caused by parent-child legal conflicts, reluctance to undermine parental authority and the difficulty of determining competence on a case by case basis.[188]

Children's rights advocates argue children should be involved in making their own life decisions.[189] A large body of empirical research accumulated over the last decade suggests children have much more competence to make their own decisions than has been recognized by the legal community.[190] Evidence from studies conducted over the last three decades indicates adolescents' ability to understand and reason regarding medical treatment does not differ substantially from adults.[191] Children's capabilities are endless if they are simply allowed to participate in the decision making process.[192] Allowing children to participate in decision making is important because it provides the child with positive reinforcement.[193] The freedom of a child to decide their course of treatment might increase the child's motivation to perform well in the proposed program or treatment.[194] Allowing children to participate in decision-making regarding treatment possibilities improves treatment by facilitating the child's willingness to cooperate.[195] This participation may also help reduce the stress of therapy, lead to better attitudes about treatment, reduce resistance to therapy and foster appropriate treatment expectations.[196] In addition, permitting children to provide informed consent may actually facilitate competence because children have not had much experience with exercising their rights.[197]

The Tennessee Supreme Court addressed a child's role in decision making in *Cardell v. Bechtol*.[198] *Cardell* examined the common law rule of capacity, known as "The Rule of Sevens."[199] This Rule presumes that there are differing levels of capacity depending on whether the individual is less than

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[188] *Id.* at 713.

[189] *Id.*

[190] *Id.* at 708.

[191] O'Shaugnessy, *supra* note 128, at 1753.

[192] *Id.*

[193] MELTON & KOOCHER, *supra* note 184, at 31.

[194] *Id.*

[195] Redding, *supra* note 9, at 708.

[196] *Id.* at 709.

[197] *Id.*

[198] 724 S.W.2d 739 (Tenn. 1987); *See* Joan Margaret Kun, *Rejecting the Adage "Children Should Be Seen and Not Heard" - the Mature Minor Doctrine*, 16 PACE L. REV. 423, 431 (1996).

[199] *Id.*

seven-years-old, between the ages of seven and fourteen, or older than fourteen.[200] Under the Rule, children under the age of seven lack capacity.[201] A rebuttable presumption of lack of capacity exists for children between the ages of seven and fourteen; and, a rebuttable presumption of capacity also exists for children between the ages of fourteen and twenty-one.[202]

These age-based classifications provide that only minors of specified ages may authorize certain medical procedures.[203] This age-based approach to consent is widely criticized because it is an arbitrary means of determining a minor's ability to consent.[204] Some children may be more mature than others at an earlier age.[205] One court has recognized the age of majority "is not an impenetrable barrier that magically precludes a minor from possessing and exercising certain rights normally associated with adulthood."[206]

Due to the inconsistencies in these age-based classifications other factors, such as the maturity and ability of the minor to consent, should be examined. The mature minor doctrine gives minors rights to determine whether to have health care rendered.[207] In *Lacey v. Laird*,[208] the Ohio Supreme Court held a physician will not be liable for battery for the performance of a surgical operation of a minor past eighteen years of age if performed with her informed consent.[209]

A child must understand that he or she possesses the right to consent or not to consent to treatment in order to render informed consent. A child should be able to: (1) weigh the risks and benefits of each treatment alternative; (2) weigh the probabilities of treatment success; and (3) provide reasoning to support each decision.[210] These factors should be weighed in determining whether

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[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] Felsman, *supra* note 86, at 351.

[204] *Id.*

[205] Dale, *supra* note 103, at 201.

[206] *In re E.G.*, 549 N.E.2d 322, 325 (Ill 1989). Seventeen-year-old girl with leukemia needed life-sustaining blood transfusions to treat her disease. The girl and her mother were Jehovah's witnesses. The hospital compelled the girl to accept the transfusion. On appeal the court recognized that the girl had a constitutional right to refuse medical treatment.

[207] SUSAN O. SCHEUTZOW, OHIO HEALTH CARE PROVIDER LAW 244 (1994).

[208] 139 N.E.2d 25 (Ohio 1956).

[209] *Id.* at 26, 34. Court held that there was no assault and battery despite the lack of consent from the child's parent or guardian. The court reasoned that to find otherwise would be inconsistent with the legislature's determination that a sixteen-year-old female can "prevent the taking of liberties with her person from being rape merely by consenting thereto at the time such liberties are taken." *Id.*

[210] Redding, *supra* note 9, at 747.

children are capable of participating in decision making with regard to treatment of ADHD and growth deficiencies. Lack of capacity is a rebuttable presumption which can be overcome by demonstrating that a child recognizes the effects of Ritalin or HGH. Allowing a child to participate in this decision-making process may possibly help the child recognize the problem if he or she has not already done so. This increased awareness may lead to more effective treatment. There is the possibility that the child will be more responsive to alternative forms of treatment. Overall, a child's competence to consent should be determined on an individual basis. In all situations children should be given a voice in determining the possible forms of treatment, whether it involves drug therapy or counseling.

V. AFFORDING PROCEDURAL DUE PROCESS

A. Children's Rights Against Their Parents' Rights In Administering Ritalin And HGH

Giving children a voice in their own life decisions is an important part of affording due process rights.[211] This idea holds true for giving kids a voice in decisions regarding the administering of Ritalin and Human Growth Hormone. Children should be afforded greater rights regarding decisions to administer these drugs because it will have an impact on the remainder of the child's life.

There is an overwhelming presumption that parents act in the best interests of their child. However, what happens when parents do not act in the best interests of the child with regard to the health and welfare of their child? Parents may blame their child for their own problems or may displace their own feelings on to the child. Parents may exaggerate the significance of a child's behavior and the unwillingness of the child to conform to parents' expectations.

When do children lose their rights to refuse medical treatment? Absent a legitimate state interest, an individual has the right to be free from forced administration of psychotropic drugs.[212] This right is recognized as an aspect of the constitutional right to privacy and bodily integrity.[213]

A state's police power and a state's *parens patriae* power are legitimate state interests which the Supreme Court has recognized.[214] The Supreme Court has approved the use of physical or chemical restraints in situations where an individual poses a threat to himself or others.[215] However, courts have refused

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[211] *Id.* at 749.

[212] O'Leary, *supra* note 1, at 1201.

[213] *Id.*

[214] *Id.* at 1202.

[215] *Id.*

to allow states to use this power for reasons of institutional convenience.[216] The police power argument as a basis for permitting the forced use of Ritalin on a child is weak because of the absence of any real threat of violence from the child.[217]

Parens patriae as a basis for administering these drugs would be a valid exercise of authority if it was in the best interest of the child. However, studies show that while a child may sit still longer, he may not be absorbing information in any meaningful way.[218] Further, for the state to intervene, the child must be deemed to be a ward of the state. The state is rarely granted this authority because a parent typically acts as a guardian in this situation.[219]

Perhaps a child is capable of recognizing a problem with his height or with his behavioral patterns in school.[220] As such, a child should be active in the decision-making process rather than immediately placing a child on Ritalin or HGH without consulting the child.

B. Children's Rights to Ritalin and HGH Over Their Parents' Objections

A child's right to Ritalin or HGH over the objection of her parents is similar to the rights a child has in receiving medical treatment over the objection of her parents. The most common reason for parental objection to conventional medical treatment is based on a parent's religion. At times, courts have considered the wishes of a minor child in reaching a decision to forgo treatment. When a minor indicates an unwillingness to undergo medical treatment voluntarily, some courts have been reluctant to order the treatment.[221]

Courts are more responsive to minor's requests for autonomy when the request involves access to rather than refusal of certain treatment.[222] Because the decisions made regarding children and enhancement drugs will impact the child for the remainder of her life, a child should be given greater deference in deciding proposed treatment even if her parents object.

The therapy chosen for a child diagnosed with ADHD will play a large role in the remainder of the child's life. A child's ultimate self-esteem when she enters the adult world will depend on how she viewed herself as a child.[223] A

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[216] *Id.*

[217] *O'Leary, supra* note 1, at 1204 (noting that clinical studies reveal that only a small minority of hyperactive children have antisocial behavior).

[218] *Id.* at 1205.

[219] *Id.*

[220] Redding, *supra* note 9, at 748.

[221] Swartz, *supra* note 145, at 187; *See* Interest of D.L.E., 614 P.2d 873 (Colo. 1980) (twelve-year-old girl refused treatment of epilepsy on religious grounds).

[222] MELTON & KOOCHER, *supra* note 184, at 250 (comparing Belotti v. Baird and Planned Parenthood v. Danforth with Parham v. J.R.).

[223] *See supra* notes 12-15 and accompanying text.

child may feel inadequate as a child and unable to compete with fellow classmates. As a result, a child may want to use an enhancement drug over the objections of her parents.

C. *Administrative Hearings*

The Supreme Court has addressed the idea of affording due process in the form of evidentiary hearings before a person's welfare benefits could be terminated.[224] In *Goldberg v. Kelly*, the Court held that due process requires an evidentiary hearing prior to termination of welfare benefits.[225] The Court based its decision on the idea that an eligible person may be denied benefits which he or she relies on while an appeal is pending.[226] This evidentiary hearing does not need to take the form of a judicial or quasi-judicial trial; but, a recipient must have "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."[227]

In *Matthews v. Eldridge*, the Court applied *Goldberg* and held that due process does not require a hearing prior to the termination of Social Security disability benefits.[228] The Court distinguished *Goldberg* and presented the following three factors which are to be considered in determining how much procedural protection an individual should be afforded: (1) how important is this to the person demanding a hearing; (2) how important is this to the governmental interest; and (3) how important is this hearing in ascertaining the truth.[229]

VI. STATUTORY RIGHT TO AFFORD PROCEDURAL DUE PROCESS

A possible solution to the conflict involved in administering Ritalin and Human Growth Hormone would be for the legislature to address the possibility of easy access to courts for children. Drawing from *Parham* and the possibility for state intervention in abortion cases, a solution would be to involve a neutral fact finder to determine what is in the best interest of the child. This neutral fact finder will determine if a child can make the decision for him or herself and, if not, what is in the best interest of the child.

Another possibility would be to conduct an administrative hearing similar to the hearing in *Goldberg*. For example, if a parent, through the treating physician, feels that Ritalin is the solution to his or her child's hyperactivity and if the child objects to the use of the drug, a hearing should be held. An administrative judge should be appointed to allow all evidence to be presented.

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[224] 397 U.S. 254 (1970).

[225] *Id.* at 264.

[226] *Id.* at 262.

[227] *Id.* at 267-68.

[228] 424 U.S. 319 (1976).

[229] *Id.* at 341-46.

At this hearing the child should be afforded an opportunity to speak out as to why the drug is not in his or her best interest. In addition, parents and doctors may present expert testimony and reports which would suggest that the drug is in the best interest of the child. This same procedure could also be applied to children seeking an administrative hearing before HGH is administered.

The inherent problem with this suggestion is who would raise the issue that the child's parents and doctors are not acting in the best interest of the child. If a child is in disagreement with his or her parents regarding enhancement medication, how will his or her voice be heard? There must be someone to whom the child can go to voice his or her concern that the medication is not the proper resolution.

The factors from *Matthews v. Eldridge* should also be applied in determining the amount of procedural protection a child should have in the administration of enhancement drugs.[230] A child's right to such a hearing is favored where the importance to the child is paramount.[231] A child will demand this type of procedural protection only if it is of great importance. The child will not have as strong of a case in proving that the government has a strong interest in regulating this activity.[232] The government will be reluctant to intrude on the sanctity of the family, and it will tend to favor the idea that the parents are acting in the best interest of the child. Finally, the decision of whether a hearing should be held will turn on the importance of determining the truth.[233] This decision will be determined based on a child's competence and, once again, whether a state will decide to interfere with the family.

The obvious obstacles are that courts and legislatures are reluctant to intrude on the sanctity of the family. In addition, such a hearing may become very expensive. Children are rebellious by their nature and children with ADHD are more likely to cause problems. Children may demand unnecessary hearings to use costly legal fees as a bargaining chip against their parents. There may also be conflict regarding when the hearing should be held. Will a hearing be held before a child is placed on the drug?

A final problem is determining what administrative agency should be involved in the Ritalin and HGH hearings. Many agencies currently in existence for children and families are already bogged down with large case loads. Children's problems with Ritalin and HGH may not be a priority because of the large number of cases these agencies handle. In addition, will the legislature be willing to spend excessive dollars to create an agency or spend the resources of a current agency? These are some of the problems that must be worked out to ensure that the child's best interest is being protected.

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230 *Id.*

231 *Id.*

232 *Id.*

233 424 U.S. at 341-46.

VII. CONCLUSION

The overuse of enhancement drugs such as Ritalin and Human Growth Hormone has become a problem that needs to be addressed. Children have rights just as adults have rights. This Note has laid out children's rights in many situations and applied these rights to the issue of improperly medicating children. This Note has proposed one possible remedy in the form of an administrative hearing. An administrative hearing will afford the child the greatest protection. However, there are many obstacles to implementing such a system. Clearly, this is a situation which needs to be addressed by a neutral third-party to ensure the proper balance between child autonomy and parental rights.

THERESE POWERS